No. 11096

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Sisquoc Ranch Company, a Corporation, on its own behalf and on behalf of Homer Sheldon Green,

Appellant,

vs.

Max Roth, Lt. Colonel, Infantry, Army of the United States,

Appellee.

APPELLANT'S OPENING BRIEF.

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No. 11096

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SISQUOC RANCH COMPANY, a Corporation, on its own behalf and on behalf of Homer Sheldon Green,

Appellant,

vs.

MAX ROTH, Lt. Colonel, Infantry, Army of the United States,

Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal by the Sisquoc Ranch Company, hereinafter referred to as "appellant", on its own behalf, and on behalf of Homer Sheldon Green, hereinafter referred to as "Green", from a final order of the United States District Court for the Southern District of California in a habeas corpus proceeding wherein the said District Court denied appellant's petition for writ of habeas corpus.

Jurisdiction.

The petition for writ of habeas corpus and amendment thereto alleges the illegal induction of Green into the armed forces of the United States in violation of the so-called Tydings Amendment regulating deferments for

agricultural workers [R. 2-30 and 36-41]. The United States District Court for the Southern District of California had jurisdiction under Title 28 U. S. C. A., Sections 451 and 452, and this court has appellate jurisdiction under Title 28 U. S. C. A., Section 463.

STATEMENT OF THE CASE.

A. The Petition for Writ of Habeas Corpus.

The petition [R. 2-30] and the amendment thereto [R. 36-41] in substance alleges: That appellant is a California corporation [R. 2] owning and operating a ranch of more than 41,000 acres of land situated in Santa Barbara County, devoted to agriculture, including the production of barley, oats, beans, sugar beets, cauliflower, potatoes, hay, grain, alfalfa and numerous other foodstuffs and agricultural commodities; that appellant also owns and ranges thereon a very large quantity of livestock [R. 4]; that Green was employed by appellant in October, 1943, and was continuously so employed until his induction into the armed forces of the United States [R. 4]; that at the time of his induction and for a long time prior thereto, Green was appellant's Assistant Superintendent and as such had complete charge of operations at ranch headquarters at all times during the absences of the Superintendent therefrom, and that due to the stress of war conditions and labor problems in agriculture, appellant was subjected to acute and critical labor shortages and that, aside from the Superintendent, Green was the only other permanent employee of appellant capable of exercising responsibility in connection with the ranch operations and that Green is a skilled agricultural worker and by reason thereof is vitally and critically needed by appellant in its multitudinous agricultural operations, and no satisfactory replacement for him can be obtained [R. 4-6].

That on June 30, 1942, Green duly registered with Local Board No. 144 of Santa Maria, California, and duly complied with all of the terms and provisions of and regulations under the Selective Training and Service Act [R. 3]: that appellant, on October 26, 1943, and March 30, 1944, filed affidavits with that Local Board claiming deferred classification for Green, and that these affidavits in substance stated the facts above set forth regarding appellant's agricultural activities and the duties and responsibilities of Green [R. 6].

That on July 11, 1944, the Department of Agriculture War Board wrote Green's Local Board to the effect that it had examined his case and found him to be even more critically needed by appellant than theretofore and that the manpower shortage on appellant's ranch put additional responsibilities on Green, and *strongly recommended his deferment* [R. 6-7]; that thereafter the Local Board, on July 22, 1944, classified Green in Class II-C (agricultural deferment class) upon a finding that he was necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, and no satisfactory replacement for him could be obtained [R. 7-8].

That on December 19, 1944, said Local Board, without any notice whatsoever to appellant or Green, and without any evidence whatsoever that Green did not, after his said clasisfication in Class II-C, remain engaged in an agricultural occupation or endeavor essential to the war effort or that a satisfactory replacement could be obtained for him, and without giving petitioner any hearing or any opportunity for a hearing at any time, reclassified Green from Class II-C to Class I-A, thereby making Green immediately eligible for service in the armed forces of the United States [R. 37]; that on December 23, 1944, ap-

pellant and Green received notice of said reclassification and, on the same day, appellant wrote said Local Board requesting a personal appearance before it and giving notice of appeal from said reclassification [R. 38]: that on January 2, 1945, appellant again wrote to the Local Board regarding the status of Green as follows:

> "The above registrant has been in the employ of Sisquoc Ranch Company for over one year and is fully conversant with the fixed plants, consisting of gas engine units, as well as the tractor and bulldozer equipment, of which he is a skilled operator.
>
> "He is now to be placed in charge of cattle feeding operations during the winter months involving the proper rationing to the beef cattle with which he is familiar.
>
> "He is a man of exceptional mechanical ability.
>
> "It is now submitted that *said registrant is a very necessary man in agriculture and can not be replaced. His loss will seriously affect the productive capacity of the Sisquoc Ranch Company.*" [R. 38]. (Italics ours.)

That said Local Board, upon receiving said letter, filed and made it a part of the records of said Local Board, and subsequently, on January 25, 1945, forwarded its said records on Green to the appropriate Appeal Board; that on January 30, 1945, the Appeal Board, without a dissenting vote, affirmed the action of said Local Board in reclassifying Green from Class II-C to Class I-A and classified Green in Class I-A, despite the fact that there was no evidence whatsoever in said Local Board record either that Green did not remain engaged in an agricultural occupation or endeavor essential to the war effort subsequent to his classification to Class II-C on or about July 19, 1944, or that a satisfactory, or any, replacement

for him could be obtained, and despite the fact that said Appeal Board knew and there was substantial and uncontradicted evidence in the said record, that the said Green did remain so engaged and in fact could not be replaced [R. 38-39].

That on March 3, 1945, appellant, by letter, requested said Local Board to reclassify Green into Class II-C, reiterating the facts above stated regarding Green's essentiality to it [R. 39]; that on March 6, 1945, the Government Appeal Agent wrote to the State Director of Selective Service in Sacramento regarding Green as follows:

> "The Board of Appeal of Santa Barbara County classified Homer Sheldon Green, Order No. 12901, in Class I-A on January 31, 1945. He is engaged in agriculture and is employed by the Sisquoc Ranch Company.
>
> "*I deem it to be in the national interest and necessary to avoid an injustice that you consider his claim for deferment and request the Board of Appeal to reconsider its determination or appeal to the President.*
>
> "I therefore recommend that you either request the Board of Appeal of Santa Barbara County to reconsider its determination or appeal to the President." [R. 9]. (Italics ours.)

That on March 17, 1945, Green received an order from said Local Board directing him to report to said board on March 30, 1945; that Green did report as requested and was transported to Los Angeles for a physical examination, and was thereafter ordered to report on April 6, 1945, for formal induction [R. 10-11].

That on April 5, 1945, the U. S. Department of Agriculture War Board wrote to said Local Board regarding the status of Green, as follows:

> "Nature of duties now being performed by registrant: Assistant Superintendent of ranch in full charge when Superintendent is absent for several days in upper ranch working cattle. As electric power is not available he has responsibility of servicing gas engines, supplying irrigating water from four wells equipped with heavy duty pump. He is a skilled mechanic and operator of tractor and bulldozer for grading and leveling of land. He repairs and remodels ranch buildings and housing units. Present duties include feed and rationing of 100 head of beef steers now in feed-pens.
>
> "This registrant is a steady and dependable worker. He is a trained man in agriculture, including livestock. *The Farm Labor Office at Santa Maria states that they have no replacement available.*
>
> "ACTION OF COUNTY WAR BOARD.
>
> "The Santa Barbara County U. S. D. A. War Board has investigated this registrant and *finds that he is continuing to be a very essential man in agriculture.* The ranch, which is the largest in Santa Barbara County, *is inadequately manned at the present time.* They are one of the largest beef producer ranches in the county. Among one of the important crops produced annually is 2500 tons of sugar-beets as well as beans and vegetables. *We therefore strongly recommend continued deferment.*" [R. 11-12.] (Italics ours.)

B. Other Events and Proceedings.

After Green's induction on April 6, 1945, and on the same day, appellant filed the petition herein on its own behalf and on behalf of Green [R. 2-30], and the District Court issued an Order to Show Cause [R. 31] directed to Green's commanding officer at Fort MacArthur, California, requiring him to appear on April 16, 1945, to show cause why a writ of habeas corpus should not be issued. On April 16, 1945, a return to said Order to Show Cause was made and filed [R. 32-33], and after argument on the hearing as to whether a writ should issue, and the filing of memoranda of points and authorities by both parties, the court took the matter under submission and on May 31, 1945, issued an order denying the prayer of appellant's petition for the issuance of a writ of habeas corpus [R. 35]. Thereafter and on June 1, 1945, the District Court, with the consent of appellee's attorney, permitted appellant to file a motion for leave to amend its petition [R. 36] and, upon the hearing of said motion, and on June 5, 1945, the District Court granted the appellant leave to file said amendment to said petition and after further argument the District Court issued its final order denying the petition for issuance of a writ of habeas corpus [R. 46-47], and on the same day appellant, on its own behalf and on behalf of Green, served and filed a notice of appeal [R. 47].

That on June 29, 1945, the parties hereto, through their respective counsel, entered into a stipulation as to the record on appeal herein [R. 48], and on July 5, 1945, appellant delivered to the Clerk of the District Court its

Statement of the Points to Be Relied Upon and Designation of the Parts of the Record for Consideration, and thereafter on July 12, 1945, said statement and designation and the certified transcript of record was received by the Clerk of this Court, and this appeal was docketed [R. 50].

Specification of Errors Upon Which Appellant Will Rely.

I.

The District Court erred in denying the petition for a writ of habeas corpus in that the following facts alleged therein, each separately, constitute sufficient ground for the granting of said petition:

(a) That the Local Board reclassified Homer Sheldon Green from Class II-C to Class I-A without giving any notice of any kind whatsoever either to Sisquoc Ranch Company or to Homer Sheldon Green.

(b) That the reclassification action of the Local Board on or about December 19, 1944, was not supported by any evidence whatsoever either that Homer Sheldon Green did not remain engaged in an agricultural occupation or endeavor essential to the war effort subsequent to his classification in Class II-C on or about July 19, 1944, or that a satisfactory, or any, replacement for him could be obtained.

(c) That the Local Board gave Sisquoc Ranch Company no hearing on the said reclassification action by the Local Board of Homer Sheldon Green from Class II-C to Class I-A, even though a written request therefor had been promptly made.

(d) That the Appeal Board affirmed the action of the Local Board in reclassifying Homer Sheldon Green from

Class II-C to Class I-A and classified Homer Sheldon Green in Class I-A despite the fact that there was no evidence in the Local Board record before it either that Homer Sheldon Green did not remain in an agricultural occupation or endeavor essential to the war effort subsequent to his classification into Class II-C on July 19, 1944, or that a satisfactory, or any, replacement for him could be obtained, and despite the fact that the Appeal Board knew and there was substantial and uncontradicted evidence in the record affirmatively showing that Homer Sheldon Green did remain so engaged and in fact could not be replaced.

II.

That the District Court erred in denying appellant's petition for a writ of habeas corpus, as amended.

Issues Involved.

(1) Whether a draft board may reclassify a registrant from Class II-C (agricultural deferment class) to Class I-A without giving notice or hearing either to the registrant or his employer?

(2) Whether a registrant's employer is entitled to a hearing before the local board on the question of the essentiality and irreplaceability of the registrant as a farm worker?

(3) Whether a draft board may reclassify a registrant from Class II-C to Class I-A in the absence of any evidence that he either did not remain engaged in an agricultural occupation or was replaceable and in the presence of substantial and uncontradicted evidence that he did remain so engaged and was irreplaceable?

(4) Whether the court below should have undertaken judicial review of the actions of the draft boards?

Summary of Argument.

The Tydings Amendment to the Selective Training and Service Act (56 Stat. 1018; Title 50 App. U. S. C. A. 305(k)), placed certain limitations on the powers of draft boards to terminate agricultural deferments once granted. This was done because the temporary and uncertain nature of the agricultural deferment was causing serious manpower problems for farmers, resulting in actual curtailment of farm production at the very time when the nation's military and civilian needs required increased production.

Under the said Tydings Amendment, persons with farm deferments were required to be left deferred so long as they remained so engaged and were not replaceable. Green's local board arbitrarily terminated his farm deferment without giving notice of any kind to appellant or to Green and without having any evidence whatever either that there had been the slightest change in his essentiality or that he was replaceable. Furthermore, not only was the record barren of support for the action taken, but there was actually substantial and uncontradicted evidence before Green's Appeal Board requiring continued deferment. In addition, the Local Board refused to give appellant a personal hearing before it even though one was immediately requested and even though appellant advised the board that Green's loss would seriously affect the productive capacity of appellant's ranch. Thereafter Green was inducted into the Armed Forces.

Under these circumstances, the draft board actions, including Green's induction order, were, and his present detention is, unlawful and the court below should have issued the writ of habeas corpus. Its failure to do so was reversible error.

In the argument here presented, we will first consider the Tydings Amendment itself, the causes that led up to its enactment, the objectives sought to be achieved, its effects as related to this case, and the respects in which the activities of Green's draft boards were violations of the law. Next the argument will be directed to the reasons why, and authorities in support of the proposition that the court below committed reversible error in refusing to issue the writ. We shall present our argument under the following headings:

I. GREEN'S RECLASSIFICATION ON DECEMBER 19, 1944, FROM CLASS II-C TO CLASS I-A WAS IN VIOLATION OF THE TYDINGS AMENDMENT.

II. SINCE THE PETITION AS AMENDED ALLEGED ACTS AND OMISSIONS OF THE DRAFT BOARDS WHICH WERE CLEAR VIOLATIONS OF THE TYDINGS AMENDMENT, THE DISTRICT COURT SHOULD HAVE GRANTED THE WRIT OF HABEAS CORPUS.

III. SINCE RESPONDENT BELOW CONCEDED THE FACTS ALLEGED IN APPELLANT'S PETITION AND AMENDMENT THERETO, THERE IS NO OCCASION FOR FURTHER HEARING BELOW, AND THIS COURT SHOULD ORDER GREEN'S DISCHARGE FROM THE ARMED FORCES.

ARGUMENT.

I.

Green's Reclassification on December 19, 1944 From Class II-C to Class I-A Was in Violation of the Tydings Amendment.

The Tydings Amendment (56 Stat. 1018; Title 50 App. U. S. C. A. 305(k)), provides as follows:

> "*Every registrant found by a selective service local board*, subject to appeal in accordance with section 10(a) (2) |section 310(a) (2) of this Appendix|, *to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, shall be deferred from training and service in the land and naval forces so long as he remains so engaged and until such time as a satisfactory replacement can be obtained: Provided*, That should any such person leave such occupation or endeavor, except for induction into the land or naval forces under this Act, his selective service local board, subject to appeal in accordance with section 10(a) (2) |section 310(a) (2) of this Appendix|, shall reclassify such registrant in a class immediately available for military service, unless prior to leaving such occupation or endeavor he requests such local board to determine, and such local board, subject to appeal in accordance with section 10(a) (2) |section 310(a) (2) of this Apendix|, determines, that it is in the best interest of the war effort for him to leave such occupation or endeavor for other work." (Italics ours.)

A. Background of Enactment of Tydings Amendment.

Originally the Selective Training and Service Act, enacted in 1940 (54 Stat. 885; Title 50 App. U. S. C. A. sec. 301 *et seq.*) contained no express provision for exemption or deferment of agricultural workers. This matter was governed through regulations issued by the Selective Service System administered by local boards. In the fall of 1942 serious curtailment of agricultural production resulting from the drafting of farm workers made it evident that there were defects in the deferment machinery as affecting agriculture. Local boards, under the regulations, granted farm workers only temporary deferments of three, four, five or six months, and farm workers were being drafted without the slightest consideration as to their need on the farm. Virtual chaos resulted. Farms and ranches could not operate on a month-to-month basis or even on a semiannual basis for agricultural planning depends on long-term calculations—from the tilling of the soil, to the planting of the seed, to the cultivation and irrigation and care of the growing crop, to the harvest—and even yearly plans intertwine with crop rotation and soil fortification and conservation. This uncertain deferment situation resulted in farm workers of draft age being drafted from and leaving the farms, causing loss of crops, forced sales of livestock not yet ready for the market, abandonment of acreage that should have been left in production, slaughtering of dairy cattle, and actual curtailment in agricultural production at a time when the Government was asking farmers to increase production substantially.

It was in this setting that the so-called Tydings Amendment to the Selective Service Act was conceived by Senator Tydings and enacted into law. (88 *Congressional Record,* Part 7, pp. 8639 to 8645.)

B. The Tydings Amendment (1) Abolished the Temporary Farm Deferment, (2) Required That Persons So Deferred and Their Employers Be Given Notice and Hearing Before Termination of Deferment, and (3) Made Such Termination Dependent on Evidence of (a) Discontinuance of Agricultural Essentiality or (b) Replaceability.

(1) This Appears From a Reasonable Construction of the Language of the Amendment Standing Alone.

The Tydings Amendment (56 Stat. 1018; Title 50 App. U. S. C. A. 305(k)) is clear:

> "Every registrant found by a selective service local board, subject to appeal in accordance with section 10(a) (2) [section 310(a) (2) of this Appendix], to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, shall be deferred from training and service in the land and naval forces so long as he remains so engaged and until such time as a satisfactory replacement can be obtained * * *."

When a man is placed in Class II-C, the agricultural deferment class, he has been found to be "necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort." Section 622.25-1 *Selective Service Regulations*, C. C. H. Manpower Law Service, p. 16,053-2. The Amendment then commands the draft board to defer the registrant "*so long as he remains so engaged and until such time as a satisfactory replacement can be obtained.*" (Italics ours.)

Certainly if the Amendment means anything at all, it means that the farmer can sow his seed without fear that his deferred farm worker, his means of raising the crop and harvesting it, will be suddenly, without notice to him

or his man, and *arbitrarily* taken from his farm. By the Amendment Congress abolished the temporary deferment situation that was causing so much havoc on the farms and withdrew the draft board's unfettered discretion once a farm deferment was granted and provided that only in the two situations specified, (1) discontinuance of agricultural activity or (2) replaceability, and after a "judicial" hearing, could a termination of the deferment be effected.

Unless this is what the Tydings Amendment accomplished, it was an idle gesture for it then made no change whatever in the existing law and practice regarding agricultural deferments.

(2) The Legislative History of the Amendment Makes This Plain.

Appellant submits that the Amendment is clear in itself; but if there be any question, the legislative history dispels all doubt.

The Amendment was introduced on the floor of the Senate without reference to conference. 88 *Congressional Record*, Part 7, p. 8644. Statements by its proponent, Senator Tydings, and its many supporters on the floor, are a recognized aid in the ascertainment of the legislative intent.

> *United States v. San Francisco*, 310 U. S. 16, 84 L.ed. 1050 (1940);
>
> *N. L. R. B. v. Thompson Products*, 141 F. (2d) 794 (C. C. A. 9th, 1944).

The impelling motive behind the Amendment, and its purpose to stabilize the agricultural deferment against temporary classifications and arbitrary reclassifications, is

succinctly and lucidly stated in Senator Tydings' opening remarks, as follows:

> "I was impelled to offer this amendment because of correspondence I have had with many farmers in my own State and some outside the State. I know of a farmer who, after he does his day's work, because all his help has left him, goes to his cornfield at night in his automobile and turns on his automobile head-lights and husks his corn in order to get it into the barn. I know of a farmer who is sowing and drill-ing wheat by moonlight at night after his day's work is done in order to get his wheat planted. These are only examples of the extreme shortage of farm labor. All my amendment seeks to do is to provide that whenever a person is employed continuously in good faith in the production of food, and taking him off the farm would leave a large section of land unculti-vated, and there is no replacement, *he shall be de-ferred upon those facts until a replacement can be found.*" (Italics ours.) 88 *Congressional Record*, Part 7, p. 8639.

The debate on the Amendment abounds in statements by Senators from all sections of the land concerning the serious consequences resulting from the uncertainty of farm deferments. The following are but a few:

> "Mr. Austin: It (the amendment) would at least result in a pause in the panic which is causing far-mers to dispose of their herds and farms. Recently I have had absolute, certain proof of the sale of as many as 75 herds on farms in northern Vermont, putting out of commission seventy-odd dairies which are an essential part of the support of our armies." 88 *Congressional Record*, Part 7, p. 8641.

> "Mr. Capper: * * * Mr. President, if agricul-ture is to be deprived of its essential manpower, and

the farmer is unable to obtain needed farm machinery and equipment, we shall not have the increased production needed. Dairy herds are being dispersed all over the country because of the inability to obtain hired help. Dairy cows are being slaughtered by the tens of thousands just when we need increased production. The same is true in other farm lines." 88 *Congressional Record,* Part 7, p. 8644.

The problems of the range, resulting from temporary deferments, were stated in an editorial printed by Senate approval as follows:

"It does not make sense to a stockman to try to winter many cattle or sheep during the coming 6 months, with his already greatly reduced number of employees, if he has no assurance whatever that his labor problem will not become continuously more severe and difficult, with the result that 6 or 8 months from now he may have to sell at least a large part of his stock and at a time when they will not be in proper condition for market. Far better for him to sell now when the stock are in shape for market and not attempt to winter his normal number.

"A stockman must look ahead for about a year. He can't operate on a month-to-month or on a quarterly or even a semiannual basis. Quite naturally and understandably stockmen are besieging their local draft boards for information and advice. But the local boards have no information on which they can base definite advice as to next year." 88 *Congressional Record*, Part 7, p. 8640.

That the Amendment was designed to supplant the temporary four, five or six months farm deferment arrangement under which the draft boards were acting and to

provide for permanent deferment unless the draft board found a discontinuance of activity or replaceability, is clear from the following by the proponent of the Amendment:

> "Mr. Tydings: Let me point out to the Senator from Vermont the fact that many farmers must now put in their crops for harvest next year. *In my judgment, this amendment, if adopted now, would permit many of them to plant a crop for harvesting next year. Many crops, including dairy crops, would not be harvested if some assurance of this kind were not given.*" (Italics ours.) 88 *Congressional Record*, Part 7, p. 8641.

and from the following, among others:

> "Mr. Lee: I am strongly in favor of the amendment to defer farm labor. The selective service defers farm labor, but only for a certain period of time. Farm labor may be deferred for 6 months or a year; but the deferment is temporary.
>
> "As a result, quite often the man who is deferred feels that at the end of that period he will be drafted anyway; so he goes ahead and enlists.
>
> "However, if the original (Tydings) amendment becomes law it will give such a man a feeling of permanency and he is more likely to remain on the farm. I believe this is one of the most important amendments which have been offered. Already so many boys have left the farm that the situation has become critical. *Therefore, we must provide for the permanent deferment of enough men to keep the farms producing.*" 88 *Congressional Record*, Part 7, p. 8642. (Italics ours.)

The purpose of the Amendment, as stated above, was to remove the draft board's discretion once an agricultural deferment was granted, except where evidence on the two points mentioned, appeared. This was pointed out by Senator Maloney, who unsuccessfully proposed modification of the Tydings Amendment which would have required one year's farm activity as a prerequisite to deferment, when he said:

> "Mr. Maloney: * * * under the language of this (Tydings) amendment, men who now go to the farms are not going to go to war. This language is a directive. It says they shall be exempt after it is found that they are on the farms. *There is no discretion left the local boards."* (Italics ours.) 88 *Congressional Record,* Part 7, p. 8644.

That Senator Maloney's interpretation was sound and not just an unimportant statement of a frustrated adversary, is clear from the fact that General Hershey, head of the Selective Service System, and in whose office the Amendment was drawn (88 *Congressional Record,* Part 7, p. 8639), agreed with that interpretation by providing in Local Board Memorandum No. 164 A, as follows:

> "Having made its decision that an individual registrant is necessary to and regularly engaged in an endeavor essential to the war effort, *the local board has no further discretion and must defer registrant.* No desire to meet calls for manpower should in any manner influence the local board's decision." (Italics ours.)

The above are not just isolated remarks by a few "farm senators." They are but a few among a great number of similar expressions, and are representative of the general view, as is evidenced by the vote which was

62 in favor and only 6 opposed. 88 *Congressional Record,* Part 7, p. 8645. The fact that there was common agreement during Congressional debate as to the purpose of the Act, may be properly considered in determining what that purpose was and what were the evils sought to be remedied.

> *Federal Trade Commission v. Raladam Co.,* 283 U. S. 643, 650, 75 L. ed. 1324, 1330 (1931).

(3) Effect of the Tydings Amendment.

Appellant submits that it is clear from the Amendment itself and its legislative history, that the legislative intent was to place curbs on draft boards in the matter of termination of farm deferments, in order to afford stability to the lingering agricultural production.

Temporary farm deferments were out. The farmer was to be freed of the worry that once his seed was sown, the harvest might be impossible as a result of a sudden drafting of his help with no consideration being given to his needs. Senator Tydings said the amendment would permit a farmer to plant his crop "now" for harvesting "next year" without fear that his help would be drafted, and that unless this assurance were given "many crops would not be harvested." (See page 18, *supra.*)

Furthermore, Congress, if it intended anything at all, clearly intended that a man, once deferred, should continue to remain in that status until such time as he (1) was no longer needed or (2) could suitably be replaced. As a result, the draft board's discretion was qualified; unless it had evidence on and found either of these elements, it was powerless to reclassify.

In addition, it follows from the requirement of evidence, that termination of an agriculture deferment must be pre-

ceded by notice and hearing—with all that those constitutional bywords import. To hold, as did the court below [R. 45], that appellant, Green's employer, was not entitled to notice and hearing, we respectfully submit is error when viewed in light of the manifest purpose of Congress not so much to come to the side of the individual farm worker (Green) but rather to protect the farmer, the employer, the man in appellant's position, upon whom the burden of agricultural production rested. The denial of a hearing to appellant is, by itself and entirely aside from the other irregularities relied on, a sufficient ground for reversal. This point is presented in detail on pages 26-28 of this brief.

If the above ends were not accomplished by the Tydings Amendment, then its passage was but an idle and useless act. Acts of Congress aspire to a higher dignity than this; and courts will not so construe them.

> *Sunshine Anthracite Coal Co. v. Adkins,* 310 U. S. 381, 84 L. ed. 1263 (1940).

C. Under the Admitted Facts in the Case at Bar, the Tydings Amendment Was Clearly Violated.

There is no dispute as to the facts [R. 46]. Green was given an agricultural deferment on July 19, 1944 after the local board had received evidence as to his essentiality to appellant's agricultural activities and after deferment had been "strongly recommended" by the U. S. Department of Agriculture War Board.

Then, without warning or notice to appellant or Green, the local board on December 19, 1944, reclassified Green

from Class II-C into Class I-A, making him immediately eligible for military service, and this was done *in the absence of any evidence whatever* either that there had been the slightest change in Green's agriculture activities or that any replacement for him was available. Thereafter, the local board denied a hearing to appellant even though one had been been requested by it and even though it had written the board on January 2, 1945 that Green was very necessary to its agricultural operations and was not replaceable and that "His loss will seriously affect the productive capacity of the Sisquoc Ranch Company" [R. 38]. Fortunately appellant had filed notice of appeal and, after several weeks, Green's file, together with the letter of January 2, 1945, was forwarded to the Appeal Board, which in due time, affirmed the action of the local board. The Appeal Board did so despite the absolute lack of evidence to support its action on either of the two points made mandatory by Congress, viz., (1) discontinuance of essential agricultural activity or (2) replaceability, and despite the admitted presence in the record before it of "*substantial and uncontradicted evidence*" [R. 41] to the contrary on both points.

Not only was there not one scintilla of evidence to support the actions of the local and appeal boards, but the record was actually replete with evidence that could point only in one direction—deferment. Much of that evidence —and by far the weightiest—came from no less impartial a source than the Federal Government. The U. S. Department of Agriculture War Board, the agency one of whose jobs it was to investigate and report on claims

for agricultural deferments, found Green to be essential to appellant's agricultural operations and irreplaceable and "strongly" recommended deferment to Green's local board. Even after the Appeal Board had acted, the U. S. Department of Agriculture War Board took the extraordinary step of communicating with Green's local board, reporting its findings as to Green's continued essentiality and irreplaceability and again "strongly" recommended "continued deferment." Even the Government Appeal Agent, an official of the Selective Service System itself (*Selective Service Regulations,* Sec. 603.71, C. C. H. Manpower Service, p. 16,007), after the action of the Appeal Board, wrote the State Director of Selective Service and asked that the termination of Green's agricultural deferment be reconsidered "in the national interest" and in order "to avoid an injustice" [R. 9].

It is difficult to conceive of more flagrant violations of the Tydings Amendment. This was the sort of thing that was curtailing agricultural production and so aroused Congress that it enacted the Tydings Amendment without even referring it to Committee, and it was this that Congress thought it was outlawing. With all due respect to Green's draft boards, it is submitted that they recklessly and arbitrarily disregarded the express command of Congress when they caused Green's induction on such a record —no notice; denial of hearing to appellant; and not even a shred of evidence, good, bad or indifferent, to support its action and in the face of substantial and uncontradicted evidence against its action.

II.

Since the Petition as Amended Alleged Acts and Omissions of the Draft Boards Which Were Clear Violations of the Tydings Amendment, the District Court Should Have Granted the Writ of Habeas Corpus.

The court below refused to undertake judicial review of the actions of Green's draft boards, despite clear and uncontradicted allegations of the petition as amended of violations of the Tydings Amendment. This was error warranting reversal, for draft boards are not above the law or the courts, even though it is undoubtedly true that a high degree of finality attaches to their findings of fact. Nor does appellant seek to relitigate questions of fact. This is simply a case where the draft boards had *NO* facts to support their actions and where appellant and Green were denied procedural due process in the matter of notice and hearing.

A. After Administrative Remedies Had Been Exhausted, and After Green's Induction, Habeas Corpus Was the Proper Procedure to Obtain Judicial Review.

The petition as amended alleges that after the action of the local board, Green's case was appealed to the Appeal Board which, without a dissenting vote, affirmed the action of the local board [R. 39]. Under the Selective Service Regulations issued pursuant to the Selective Training and Service Act, this was the end of appellant's and Green's administrative remedies. Sec. 628.2 *Selective Service Regulations*, C. C. H. Manpower Law Service, p. 16, 110. Appellant also alleged that Green had been inducted and "* * * is as of the time and date of the filing of this petition, and has from the date of his induction been,

wrongfully restrained of his liberty and held in wrongful custody by the Armed Forces of the United States * * *." [R. 14.]

These allegations establish the required basis for a petition for a writ of habeas corpus to review draft board action alleged to be without due process and in violation of law.

In the case of *United States ex rel Phillips v. Downer*, 135 F. (2d) 521 (C. C. A. 2, 1943), the Circuit Court, at page 522, said:

> "Since the draftee has, therefore, obeyed the law by responding to the call for induction and has relied upon the writ of habeas corpus to test his legal rights, questions of procedure such as have arisen in cases of a similar nature are here avoided and he has placed himself in the proper position to challenge the legality of his induction."

See also:

United States ex rel Levy v. Cain, 149 F. (2d) 338, at p. 342 (C. C. A. 2, 1945);

United States v. Bowles, 131 F. (2d) 818 (C. C. A. 3, 1943), affd. 319 U. S. 33, 87 L. ed. 1194 (1943).

B. The Draft Board Decisions Should Have Been Subjected to Judicial Review for Violations of Law and Denials of Due Process Alleged by Petitioner.

Appellant does not dispute that the draft board decisions on questions of fact are final. In fact, the Selective Training and Service Act so provides (Title 50 App. U. S. C. A. sec. 310). But where a draft board has violated the law or denied due process, the courts will not hesitate to undertake judicial review, nullify the induction and order the release of the registrant.

(1) Denial of Hearing to Appellant Required Issuance of the Writ.

The denial of a hearing by the local board to appellant, Green's employer, even though promptly requested by it, was clearly a denial of due process into which the District Court should have inquired. Only in April of this year Judge Learned Hand of the Circuit Court of Appeals for the Second Circuit wrote an opinion in the case of *United States ex rel Levy v. Cain*, 149 F. (2d) 338, 341, reversing an order which quashed a writ of habeas corpus, and ordering an inductee released from the Armed Forces because the local board had, to some extent, relied on a recommendation of a panel of experts, without disclosing to the registrant the identity of the members of the panel. Now, there was nothing in the statute or regulations requiring such disclosure. Yet the court was of the opinion that non-disclosure was a procedural irregularity tantamount to a denial of a fair trial since it prevented effective challenge as to bias, predelictions or acquaintance with the subject for decision of the panel members.

What greater denial of fairness could there be than the local board's refusal to grant appellant's request for a personal appearance on the issue of Green's continued essentiality and irreplaceability, especially in light of the clear intention of Congress primarily to assist farmers in retaining the help that is necessary and irreplaceable, in order to avert the food crisis that was facing the nation as a result of the drafting of needed farm workers without consideration of the farmers' needs (see pages 15-20 above)?

Does it make a particle of sense to say to the farmer, "your workers will not be taken off your farms so long as they remain engaged as essential farm workers and are

not satisfactorily replaceable" and then when the draft board proceeds to take steps to draft a farm worker for the board to deny that farmer a personal hearing even though he (1) makes an immediate request therefor and (2) writes the board that the farm worker is still essential on his farm and cannot be replaced and that his loss will seriously affect the productive capacity of the farm? This is precisely what happened in this case [R. 38, 39].

Does it not seem fundamental that the farmer should be the very person, above all others, who is entitled to a hearing upon these issues since he is the one who was given relief by the Tydings Amendment? Must he not be given an opportunity personally to acquaint the board members with his particular farming problems, to meet and discuss the ideas of the board members and, if necessary, produce other facts or information so as to enable him to give the board members as complete a picture as possible of all factors bearing on the issues?

We earnestly contend that the right to a personal hearing was, by necessary implication, conferred upon the farmer when Congress enacted the Tydings Amendment.

We respectfully submit that this denial of hearing to appellant was so fundamental a denial due process that it was error for the District Court to refuse to inquire into it.

In the case of *Chin Yow v. United States*, 208 U. S. 8, 52 L. ed. 369 (1908), the opinion by Mr. Justice Holmes is squarely in point. There the District Court had also denied a petition for a writ of habeas corpus. The petition claimed the administrative order to be invalid because petitioner had been denied a hearing before the administrative body. The Supreme Court, in reversing the District Court dismissal of the petition, held that the allega-

tions were sufficient to warrant the issuance of the writ, and, at page 12, said:

> "The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation, on the one side, and the conclusiveness of the Commissioner's fiat, on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts."

Just as the Act there involved provided that the department's decision was "final", so does the Selective Training and Service Act provide with respect to draft board decisions. Yet the Supreme Court recognized the right of the person affected by the administrative action to a personal hearing and held that a denial of this right went to the very heart of constitutional guarantees. It is submitted that the considerations in the *Chin Yow* case and our case are parallel and that it was error for the Court to refuse to inquire into appellant's denial of a hearing.

(2) Failure of Local Board to Give Notice to Either Appellant or Green Before It Terminated His II-C Classification, Required Issuance of the Writ.

One of the effects of the Tydings Amendment was to abolish the temporary farm deferment that had been causing so much instability in the farm labor market and to curb the powers of the draft boards to reclassify persons with agricultural deferments until there was evidence of

(1) continuance of essentiality or (2) replaceability. (See pages 20-21 above.) It is axiomatic that such findings necessarily require notice and hearing, for otherwise there is no opportunity to present evidence, and the rudiments of fair play essential to the validity of administrative actions would be denied.

> *American Toll Bridge Co. v. Railroad Commission*, 307 U. S. 486, 83 L. ed. 1414 (1939);
>
> *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 83 L. ed. 126 (1938);
>
> *Shields v. Utah Idaho C. R. Co.*, 305 U. S. 177, 83 L. ed. 111 (1938);
>
> *Morgan v. United States*, 304 U. S. 1, 82 L. ed. 1129 (1938).

Consequently the action of Green's local board in terminating his II-C classification on December 19, 1944, was error in law and in itself required issuance of a writ of habeas corpus.

In *United States ex rel Beye v. Downer*, 143 F. (2d) 125 (C. C. A. 2, 1944), an inductee was ordered released from the Armed Forces because the local board "clearly disregarded the regulations" of the Selective Service System, and in *United States ex rel Phillips v. Downer*, 135 F. (2d) 521, (C. C. A. 2, 1943) another inductee was released because the local board had misinterpreted the law as to the conscientious objection exemption.

Similarly the failure to give notice before termination of Green's II-C classification was error in law and in itself rendered the induction unlawful.

(3) Lack of Any Evidence, Substantial or Otherwise, to Support the Termination of Green's Agricultural Deferment, Required Issuance of the Writ.

The Government has conceded that Green's local and appeal boards had no evidence whatsoever to support its action [R. 40, 41, 44 and 46]. Here certainly is a sufficient ground for the issuance of a writ. Perhaps the most authoritative decision on this point, because of its recentness and thorough treatment of the subject, and because the United States Supreme Court denied *certiorari*, is *United States ex rel Trainin v. Cain*, 144 F. (2d) 944 (C. C. A. 2, 1944) (*cert. den.* Jan. 8, 1945, 89 L. ed. 412), in which the Circuit Court, at page 947, said:

> "Undoubtedly the statutory provision that decisions of the selective service board shall be 'final' narrowly limits the scope of judicial examination of board actions; but it is clear that Congress through use of such words cannot deny any registrant the constitutional protections of due process of law. See Angelus v. Sullivan, 2 Cir., 246 F. 54, 63, and cases cited therein. Thus it is error reviewable by the courts when it appears that the proceedings conducted by such boards 'have been without or in excess of their jurisdiction, or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act.'"

and at page 948, said:

> "*to deny review, whatever may be the facts, so long as the forms of law have been followed, is to constitute arbitrary and unfair action*, as was held in Arbitman v. Woodside, supra, *which is not consonant*

with our historic ideas of due process. To hold the findings final if supported by any evidence seems an apt compromise between the conflicting ideals of expeditious functioning of the draft laws and requital of the historic guarantees of due process of law." (Citations omitted.) (Italics ours.)

Also in the same Circuit in *United States ex rel Phillips v. Downer*, 135 F. (2d) 521 (C. C. A. 2, 1943) the court ordered the inductee released from the Armed Forces because of the denial of claim for a conscientious objection exemption had been based entirely upon a play written by the inductee which the local board construed to indicate that his conscientious objection was based on political objections rather than religious beliefs. The court considered the play at great length in its opinion and concluded that the construction given it by the draft board was erroneous and that the play could not be considered to be "any substantial evidence to support the draft classification."

In our case, there admittedly was no evidence whatsoever, good, bad or indifferent, to support Green's classification from II-C to I-A.

This point was also squarely raised in *Arbitman v. Woodside*, 258 F. 441 (C. C. A. 4, 1919), in a habeas corpus case growing out of the first World War. The local board had denied the inductee's claim for exemption as an alien despite the lack of any support for its action. The Circuit Court, in reversing the District Court's denial of a writ, at page 442, said:

"The rule is established that the action of such executive boards within the scope of their authority is final, and not subject to judicial review, when the investigation has been fair and the finding supported

by substantial evidence; but upon proof that the investigation has not been fair, or that the board has abused its discretion by a finding contrary to all the substantial evidence, relief should be given by the courts under the writ of habeas corpus." (Extensive citations omitted.)

The authority of this case has been brought up to date by virtue of the strong reliance placed upon it by the *Trainin v. Cain* case decided by the Second Circuit Court of Appeals last year and discussed above on pages 30-31.

See also:

Graf v. Mallon, 138 F. (2d) 230, 234, 235 (C. C. A. 8, 1943);

United States v. Messersmith, 138 F. (2d) 599 (C. C. A. 7, 1943);

Seele v. United States, 133 F. (2d) 1015 (C. C. A. 8, 1943);

Benesch v. Underwood, 132 F. (2d) 430-431 (C. C. A. 6, 1942);

Rase v. United States, 129 F. (2d) 204, 207 (C. C. A. 6, 1942);

Johnson v. United States, 126 F. (2d) 242 (C. C. A. 8, 1942).

(4) Termination of Agricultural Deferment in the Teeth of Substantial and Uncontradicted Evidence to the Contrary, Required Issuance of Writ.

Not only was the action of Green's draft board a violation of law because not supported by any evidence, as pointed out above, but Green's Appeal Board also admittedly acted in the face of substantial and uncontradicted evidence supporting the claim for continued de-

ferment [R. 41, 43-46]. The seriousness of this violation becomes evident from the fact that this Court has held Appeal Board action to be *de novo* and to completely supersede that of the local board.

> *Cramer v. France,* 148 F. (2d) 801 (C. C. A. 9. 1945).

The entire argument considered above to the effect that draft board action must be supported by substantial evidence, applies as well under this head. The violation charged is the more aggravated, however, because there was actually substantial and uncontradicted evidence before the Appeal Board in support of continued deferment. In the language of the Eighth Circuit, such a classification:

> "* * * made in the teeth of all of the substantial evidence before such (draft) agency is not honest but arbitrary. Courts can prevent arbitrary action of such agencies from being effective."
>
> *Johnson v. United States,* 126 F. (2d) 242, 247 (C. C. A. 8, 1942).

The Sixth Circuit has likewise held that if the draft board has found:

> "* * * contrary to all the substantial evidence, the courts are open for relief under the writ of habeas corpus."
>
> *Benesch v. Underwood,* 132 F. (2d) 430, 431 (C. C. A. 6, 1942).

See also:

> *Rase v. United States,* 129 F. (2d) 204 (C. C. A. 6, 1942).

If the court below was right in refusing to issue the writ despite the fact that there was substantial and uncon-

tradicted evidence before the Appeal Board requiring continued deferment and not one piece of evidence opposed, then it is respectfully submitted that there is no such thing as judicial review, no matter how restricted, over draft board action so long as the draft board goes through the motions of correct procedure. Substance then abdicates to form and the law means nothing for it cannot be brought to bear on the draft board. But the courts will not tolerate this for, as was so well stated in the case of *Trainin v. Cain,* 144 F. (2d) 944, at page 948:

> "* * * to deny review, whatever may be the facts, *so long as the forms of law have been followed,* is to constitute arbitrary and unfair action, as was held in Arbitman v. Woodside, supra, *which is not consonant with our historic ideas of due process.*" (Italics ours.)

(5) None of the Violations Herein Alleged Have Been Passed On in This Circuit.

There has been no direct holding in this Circuit on the questions here presented by appellant, though this Court on several occasions has been asked to review convictions for failure to report for induction

> *Crutchfield v. United States,* 142 F. (2d) 170 (C. C. A. 9, 1943);
>
> *Bagley v. United States,* 144 F. (2d) 788 (C. C. A. 9, 1944),

and *habeas corpus* proceedings *where the evidence before the draft board was conflicting.*

> *Cramer v. France,* 148 F. (2d) 801 (C. C. A. 9, 1945);
>
> *Sullivan v. Swatzka,* 148 F. (2d) 965 (C. C. A. 9, 1945).

The *Bagley* and *Crutchfield* cases are of no particular help here since they merely go to the point that wrongful action by draft boards cannot be raised by way of defense to a criminal proceeding for failure to report for induction.

See also:

> *Falbo v. United States,* 320 U. S. 549, 88 L. Ed. 305 (1944).

Their only value here is on the point that the procedure employed in the case at bar, that is, exhaustion of administrative remedies and petition for writ of *habeas corpus* after induction, is the proper way to raise the questions herein presented.

The *Cramer* and *Swatzka* cases, *supra,* did employ the proper method of attack and in both the inductees were remanded to the Armed Forces. However, in both cases, the draft boards had evidence to support the denial of the claims for agricultural deferments. In fact, in each case, the U. S. Department of Agriculture War Board recommended *against* deferment as opposed to consistent recommendations *in favor* of deferment in our case [R. 6, 7, 11 and 12].

It is admitted in the case at bar that there is no conflict in the evidence before the draft board. All of the evidence was in support of continued deferment [R. 23-30, 38-39, 44, 46].

In the *Swatzka* case, this Court did recognize that draft boards are "required" to act "judicially." It can hardly be said that such requirement was observed in the case at bar.

C. The Fact That Appellant Rather Than Green Requested the Deferment Is Not Basis for Denying Issuance of the Writ.

In its oral opinion, the court below noted that Green had "not himself made any application or request to the local board for a deferment, under the Tydings Amendment" [R. 45].

This, however, is not ground for refusing to issue the writ as the Selective Service Regulations, C. C. H. Manpower Law Service, pp. 16,041 to 16,111, confer on employers the *right to request deferments as well as rights of appeal,* as follows: An employer may file with the local board affidavits for occupational classification (Sec. 621.4(b), and may present information, documents, affidavits or depositions in support thereof (Sec. 621.4(c)). The local board must, on classification of registrant, mail advice thereof to the employer (Sec. 623.61(b)). The employer may request the local board to reopen and consider anew registrant's classification (Sec. 626.2), and when the local board at any time determines registrant should be "considered for classification into a class available for military service," it must in certain cases notify the employer and allow him 15 days to file an affidavit (Sec. 626.2-1). The employer may appeal from any determination of a local board (Sec. 627.2(a)), and, upon appeal, may submit certain information regarding the local board action (Sec. 627.12). The local board must advise the employer of the Appeal Board action (Sec. 627.31(a)), and, in a proper case, the employer may appeal to the President (Sec. 628.2).

The petition clearly alleges that appellant applied for and obtained an agricultural deferment for Green [R. 6, 15-22]. Therefore, there was no irregularity in the fact that appellant rather than Green took the necessary steps for deferment before Green's draft board.

D. The Fact That Petition to the District Court Was Made by Appellant Rather Than Green Is Not Basis for Denying Issuance of the Writ.

(1) There Can Be No Question That Petition on Behalf of Green Was Authorized.

In the case of *Collins v. Traeger*, 27 F. (2d) 842 (C. C. A. 9, 1928), this Court held that the petitioner for a writ of habeas corpus need not be the person restrained of his liberty where it appeared that the restrainee was in custody and in peril of being removed from the jurisdiction of the court before he could act in person. The petition herein sufficiently alleges these conditions [R. 3].

(2) Furthermore, Appellant Had Standing in Its Own Right to Petition for the Writ.

Reference is made to the argument above (p. 26-28) to the effect that the Tydings Amendment was primarily enacted for the benefit of farmers in order to assist them in keeping needed and irreplaceable farm help. It necessarily follows that appellant had the right to question the violation to his detriment of the statute enacted for his benefit. The fact that the administrative order here operates directly on Green rather than on appellant does not deprive appellant of standing to challenge it since appellant has a sufficient interest in Green's freedom from restraint by virtue of employer-employee relationship.

In the case of

> *Baltimore & O. R. Co. v. United States*, 264 U. S. 258, 68 L. ed. 667 (1924),

it was held that a railroad had a sufficient interest in an administrative order rendered in favor of a competitor railroad to entitle it to judicial review of the order.

See also:

> *Moffat Tunnel League v. United States*, 289 U. S. 113, 77 L. ed. 1069 (1933).

III.

Since Respondent Below Conceded the Facts Alleged in Appellant's Petition and Amendment Thereto, There Is No Occasion for Further Hearing Below, and This Court Should Order Green's Discharge From the Armed Forces.

At the hearing in the court below on the sufficiency of the petition and amendment thereto, the respondent conceded that all the facts alleged therein were true *and that it could add nothing* to the petition and the affidavits, records attached thereto, and the additional matters presented in the amendment to the petition, and that accordingly there was no need for a hearing [R. 44]. And in its opinion the court below stated:

> "The court sees no reason why, in view of the statement of the Government, that there is no dispute with reference to the facts stated in the petition and the amended petition, there should be any necessity for a hearing. It will therefore be assumed that all

of the facts stated in the petition and the amendment to the petition for the Writ of Habeas Corpus are conceded by the Government, the same as if a hearing were held." [R. 46.]

We therefore respectfully submit that the order of the court below should be reversed and that this Court should by its order direct the release of Green from the custody of the Armed Forces.

Respectfully submitted,

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